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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

JANIX, INC.,)	
)	
Plaintiff,)	2:12-cv-02084-GMN-NJK
)	
vs.)	
)	
JOEL RAES and CONSUELA KONI RAES,)	<u>ORDER</u>
)	
Defendants.)	

Before the Court is Plaintiff's *Ex Parte* Motion to Stay Requirement to File Discovery Plan (#16), filed on May 20, 2013.

BACKGROUND

On December 6, 2012, the Plaintiff filed a complaint and amended complaint in this matter alleging embezzlement by its former website manager. On April 5, 2013, the Defendants filed a motion to dismiss. That motion to dismiss was fully briefed on May 2, 2013, and is still pending. To date, the parties have not filed a proposed discovery plan and scheduling order as required by Fed.R.Civ.P. 26. The Rule 26(f) conference was required to be held within 30 days of April 5, 2013, when the first Defendants filed their Motion to Dismiss, and the stipulated discovery plan was due 14 days thereafter. *See* Local Rule 26-1(d). Thus, the final date to submit the proposed discovery plan and scheduling order was May 20, 2013.

“When an ex parte motion is filed . . . [t]he judge drops everything except other urgent matters to study the papers. It is assumed that . . . all will be lost unless immediate action is taken.” *Mission Power Eng'g Co. v. Cont'l Cas. Co.*, 883 F. Supp. 488, 491-92 (C.D. Cal. 1995). “Lawyers must understand that filing an *ex parte* motion, whether of the pure or hybrid type, is the forensic equivalent of standing in a crowded theater and shouting, ‘Fire!’ There had better be a fire.” *Id.* Accordingly, courts are highly sensitive to unwarranted *ex parte* motions. *Id.*

“A sliding scale is used to measure the threat of prejudice. If the threatened prejudice would not be severe, then it must be apparent that the underlying motion has a high likelihood of success on the merits. If drastic harm is threatened, then it is sufficient to show that there are close issues that justify the court's review before the party suffers the harm.” *Id.*

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1 Here, the Plaintiff failed to show good cause why this motion was submitted to the Court
2 as an *ex parte* motion. See LR 7-5(b). The Plaintiff does not even attempt to argue that it will be
3 irreparably prejudiced if the underlying motion is heard according to regular noticed motion
4 procedures. Rather, the Plaintiff states that the Defendants have agreed to arbitration and that the
5 parties will be filing a stipulation shortly. If both parties wish to stay this case pending their
6 formal stipulation to arbitrate, the correct manner to make this request is a stipulation to stay.²
7 The present motion to stay simply does not establish that the Plaintiff will be irreparably
8 prejudiced if its motion is heard on the regular motion calendar.

9 Additionally, the Court notes that the parties did not properly meet and confer prior to the
10 filing of this motion. LR 26-7(b) provides that a “[d]iscovery motion will not be considered
11 unless a statement of the movant is attached thereto certifying that, after personal consultation
12 and sincere effort to do so, the parties have not been able to resolve the matter without Court
13 action. LR 26-7. Personal consultation means the movant must “personally engage in two-way
14 communication with the nonresponding party to meaningfully discuss each contested discovery
15 dispute in a genuine effort to avoid judicial intervention.” *ShuffleMaster, Inc. V. Progressive*
16 *Games, Inc.*, 170 F.R.D. 166, 171 (D. Nev. 1996). Meaningful discussion means the parties must
17 present the merits of their respective positions and assess the relative strengths of each. *See*
18 *Fifty-Six Hope Rd. Music, Ltd. v. Mayah Collections, Inc.*, 2007 WL 1726558, *11 (D. Nev. June
19 11, 2007). Here, the Plaintiff failed to indicate what efforts, if any, were made to meet and confer
20 prior to filing this *ex parte* motion.

21 Accordingly, the parties should properly meet and confer on this issue and try to reach an
22 agreement on this matter. However, if no agreement can be reached, the Plaintiff may re-file this
23 motion as a noticed motion and, upon a showing of good cause, may request an expedited
24 briefing schedule.

25 ...

26 ...

27
28 ²Stipulations to stay are subject to the requirements articulated in *Tradebay, LLC v. eBay, Inc.*, 278 F.R.D 597(D. Nev. 2011).

CONCLUSION

Based on the foregoing, and good cause appearing therefore,

IT IS HEREBY ORDERED that Plaintiff's *Ex Parte* Motion to Stay Requirement to File
Discovery Plan (#16) is DENIED without prejudice.

DATED this 20th day of May, 2013



NANCY J. KOPPE
United States Magistrate Judge